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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

GREG GARRISON, individually and on
behalf of all others similarly situated;

Plaintiff,

v.

ORACLE CORPORATION, a Delaware
corporation;

Defendant.

CASE NO. 5:14-cv-04592-LHK

**DEFENDANT ORACLE CORPORATION'S
NOTICE OF MOTION AND MOTION FOR
A PROTECTIVE ORDER**

**REDACTED VERSION OF DOCUMENT
SOUGHT TO BE SEALED**

Date: March 31, 2015
Time: 10:00 a.m.
Place: Courtroom 5, 4th Floor
Judge: Honorable Paul S. Grewal

**DEFENDANT ORACLE CORPORATION'S
NOTICE OF MOTION AND MOTION FOR A PROTECTIVE ORDER**

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on March 31, 2015 at 10:00 a.m., or as soon thereafter as counsel may be heard before the Honorable Paul S. Grewal, United States Magistrate Judge, in Courtroom 5 of the above-captioned court, located at 280 South 1st Street, San Jose, California, 95113, Defendant Oracle Corporation ("Oracle") will and hereby does move pursuant to Federal Rule of Civil Procedure 26(c) for a protective order precluding Plaintiff's 30(b)(6) deposition of Oracle regarding its collection, preservation, and production of electronically stored information and its efforts to respond to Plaintiff's discovery requests.

This motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declaration of Sarah M. Ray in Support of Oracle's Motion for a Protective Order, the records on file in this case, the oral argument of counsel, and any other matter that the Court may properly consider, or that may be presented to the Court at the hearing.

Oracle respectfully requests that the Court grant its motion and issue a protective order shielding Oracle from plaintiff's premature and inappropriate 30(b)(6) deposition.

Dated: February 20, 2015

Respectfully Submitted,

/s/ Sarah M. Ray

Sarah M. Ray

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Greg Garrison’s complaint seeks to ensnare Oracle in the widely publicized “no poach” conspiracy that was the subject of a U.S. Department of Justice (“DOJ”) investigation and is at issue in the *In re High-Tech Employee Antitrust Litigation* (“*High-Tech*”) that is proceeding before Judge Koh. Both the DOJ and the *High-Tech* plaintiffs took discovery from Oracle years ago, and both chose to bring no claims against Oracle. Nonetheless, based on a single Google-created document produced in the *High-Tech* litigation which mentions Oracle—but describes no agreement or conduct by Oracle—Plaintiff alleges that Oracle entered into an agreement with Google “not to pursue” each other’s “manager level and above” employees in “Sales, Product, and General and Administrative” roles. *See* Antitrust Class Action Compl. (ECF No. 1) ¶¶ 4, 19. Oracle has denied Plaintiff’s allegations and maintained throughout that it had no such agreement with Google.¹ For this reason, and the legal deficiencies in Plaintiff’s complaint, Oracle moved for judgment on the pleadings on January 5, 2015. *See* Oracle Corp.’s Motion for Judgment on the Pleadings (ECF. No. 17). Oracle’s motion is scheduled to be heard by Judge Koh on April 23. *See id.*

This case is otherwise in its infancy. Discovery opened on January 21, 2015, after the parties’ first Case Management Conference before Judge Koh. *See* Case Management Or. (ECF No. 25). Plaintiff served its first discovery requests, including thirty-nine broad requests for the production of documents, on Oracle that same day. *See* Declaration of Sarah M. Ray (Feb. 20, 2015) (“Ray Decl.”) ¶ 2, Exs. 1 and 2. A week later—before Oracle had produced a single document and long before the February 23, 2015 deadline for Oracle’s responses and objections—Plaintiff served Oracle with notice of a 30(b)(6) deposition scheduled for February 17, 2015 to address the steps Oracle has taken to preserve, collect, and produce electronically

¹ Indeed, the only document produced to date in this litigation confirms that there was no such agreement between Oracle and Google. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1 stored information and Oracle's efforts to respond to Plaintiff's pending discovery requests. *Id.* ¶
 2 3, Ex. 3.

3 Oracle informed Plaintiff on February 5, 2015 that his noticed 30(b)(6) deposition was
 4 premature and inappropriate because it seeks information protected from disclosure under the
 5 attorney-client and work-product privileges. *Id.* ¶ 4, Ex. 4. In an attempt to compromise, Oracle
 6 offered to provide Plaintiff with information regarding its document retention, preservation, and
 7 destruction policies, as well as when and to whom Oracle issued litigation holds related to this
 8 case, if requested through an appropriate interrogatory. *Id.*

9 The parties met and conferred by telephone on February 11, 2015. *Id.* ¶ 5. Plaintiff's
 10 counsel maintained that Plaintiff could not proceed with discovery in this case without knowing
 11 where Oracle's documents are located and refused to withdraw his 30(b)(6) deposition notice,
 12 *see id.*, leaving Oracle with no choice but to seek relief from the Court.

13 Because Plaintiff's noticed 30(b)(6) deposition is premature and seeks privileged and
 14 protected information, Oracle respectfully requests that the Court grant its motion and issue a
 15 protective order.

16 **II. STATEMENT OF ISSUES TO BE DECIDED**

17 Whether a protective order is necessary to shield Oracle from Plaintiff's premature and
 18 inappropriate request for a 30(b)(6) deposition regarding Oracle's efforts to collect, preserve, and
 19 produce electronically stored information and the steps Oracle has taken to respond to Plaintiff's
 20 pending discovery requests.

21 **III. PLAINTIFF'S 30(B)(6) DEPOSITION NOTICE**

22 On January 28, 2015, without any notice or attempt to meet and confer, Plaintiff noticed a
 23 30(b)(6) deposition of Oracle for February 17, 2015 at Hogue & Belong's offices in San Diego,
 24 California.² *See* Ray Decl. ¶ 3, Ex. 3. The deposition notice identifies ten topics for Oracle's
 25 deposition related to Oracle's document collection, preservation, and production efforts,
 26 including:

27 ² Plaintiff's unilateral attempt to schedule Oracle's deposition without first meeting and
 28 conferring with Oracle's counsel was in plain violation of N.D. Cal. L.R. 30-1.

1. Oracle's "efforts to search for, identify, collect, and or produce documents in this litigation";
2. "The identity of all past and present employees whose documents [Oracle] identified, collected, reviewed, searched, or considered identifying, collecting, reviewing, or searching in connection with [Oracle's] efforts to identify, collect and produce documents for this litigation";³
3. "The destruction, loss, misplacement, deletion of, or inability to recover any documents relevant or potentially relevant to this litigation or responsive to Plaintiff's discovery requests, including without limitation the dates that such documents were destroyed, misplaced, or rendered no longer available or reasonably available for discovery purposes, the contents thereof, and the reason(s) for their destruction, loss, or alternation";
4. Oracle's "document retention and document destruction policies, practices, and procedures in force at all relevant times, including the applicability or inapplicability of those policies, practices, and procedures to documents relevant or potentially relevant to this litigation";
5. Oracle's "efforts or plans to preserve documents relevant or potentially relevant to this litigation, including but not limited to each step taken to preserve such documents";
6. "The mechanisms or systems . . . used by [Oracle] to create, store, back-up, and recover documents relevant or potentially relevant to this litigation, including but not limited to emails, presentations and spreadsheets";
7. Oracle's "ongoing efforts to investigate, identify, preserve, collect, and produce documents and things responsive or potentially responsive to Plaintiff's discovery

³ Request No. 2 also requests that Oracle "identify" all past and present employees whose documents Oracle "considered identifying, collecting, reviewing, or searching, in connection with [its] efforts to identify, collect and produce documents for this litigation *or any investigation leading to the filing of the litigation.*" Ray Decl., Ex. 3 (emphasis added). Oracle has disregarded this last portion of Plaintiff's 30(b)(6) notice as it was clearly cut and paste from another document as Oracle did not file this litigation.

requests and relevant or potentially relevant to this litigation”;

8. “The existence, description, and location of documents relevant or potentially relevant to this litigation and responsive or potentially responsive to Plaintiff’s discovery requests”;

9. “The identification (including last known address and telephone number) of any person who has or is believed to have knowledge about the facts underlying the foregoing topics”; and

10. “The identification of any document reflecting or memorializing any facts called for in the foregoing topics.”

Ray Decl., Ex. 3.

IV. ARGUMENT

Under Federal Rule of Civil Procedure 26(c)(1), the Court may issue a protective order for “good cause” “to protect a party . . . from annoyance, embarrassment, oppression, or undue burden or expense.” A protective order is warranted here to protect Oracle from the undue burden and expense of having to prepare for and attend a premature, inappropriate, and unwarranted 30(b)(6) deposition regarding its efforts to collect, preserve, and produce electronically stored information and its efforts to respond to Plaintiff’s pending discovery requests.

A. Plaintiff’s Request For A 30(b)(6) Deposition Regarding Oracle’s Collection, Preservation, And Production Of Electronic Documents Is Premature

Plaintiff’s 30(b)(6) deposition notice indicates that Plaintiff seeks information regarding Oracle’s document preservation policies, collection, and production efforts, including the steps Oracle has taken to respond to Plaintiff’s pending discovery requests. *See* Ray Decl., Ex. 3. Plaintiff’s demand of a 30(b)(6) deposition on these topics is premature.

This case is only in the very early stages of discovery. Oracle has not yet produced a single document to Plaintiff. Indeed, Plaintiff served by mail its first set of interrogatories and requests for production on January 21, 2015, *see* Ray Decl. ¶ 2, and under Fed. R. Civ. P. 34, Oracle’s responses and objections are not due until February 23, 2015. Oracle intends to comply

1 fully with its obligations under the Federal Rules but its review of Plaintiff's interrogatories and
 2 requests for production remains ongoing. Ray Decl. ¶ 2. And, in accordance with Rules 33 and
 3 34, Oracle intends to raise objections to Plaintiff's requests and anticipates that the parties will
 4 need to engage in a meaningful meet and confer process before Oracle can collect, process, and
 5 produce documents or otherwise respond to Plaintiff's requests. *Id.* As a result, Oracle is not in
 6 a position where it can answer questions regarding its identification, collection, and production
 7 of documents responsive to Plaintiff's requests, as such efforts remain ongoing.⁴

8 Moreover, courts have refused to compel 30(b)(6) depositions regarding a defendant's
 9 preservation and maintenance of electronically stored information at the outset of discovery. For
 10 example, in *Miller v. York Risk Services Group*, 2014 WL 1456349, at *1 (D. Ariz. Apr. 15,
 11 2014), the district court denied plaintiffs' motion to compel the defendant to sit for a 30(b)(6)
 12 deposition regarding "the manner and methods used by the defendant to store and maintain
 13 electronic data." The district court rejected plaintiffs' argument—the same argument raised by
 14 Plaintiff here—that "starting with discovery of the manner and means of how Defendant stores
 15 ESI will allow them to tailor requests in the future." *Id.* at *2. The *Miller* court concluded that
 16 the opposite was true: "starting discovery with such an inquiry puts the cart before the horse and
 17 will likely increase, rather than decrease, discovery disputes." *Id.* The court further held that
 18 "[i]nstead of beginning with a deposition that address[es] nothing but process, discovery should
 19 start with inquiries that seek substantive information." *Id.*

20 As in *Miller*, there is no reason to begin discovery in this case by subjecting Oracle to a
 21 wide ranging Rule 30(b)(6) deposition regarding the manner and methods Oracle employs to
 22 maintain its electronic information or its efforts to respond to Plaintiff's discovery requests.
 23 Plaintiff does not need this information to propound discovery upon Oracle, as is evident from
 24 the thirty-nine broad document requests already served, nor is inquiry into these topics
 25 appropriate at this early stage of discovery.

26
 27 ⁴ In any event, Oracle's efforts to respond to Plaintiff's discovery requests are privileged
 28 under both the attorney-client privilege and work-product doctrine, as explained *infra* at Section IV.B.

B. Plaintiff's 30(b)(6) Deposition Notice Seeks Information That Is Protected From Disclosure Under the Attorney-Client Privilege And Work-Product Doctrine

Plaintiff's noticed 30(b)(6) deposition is also inappropriate because much of the information it seeks to elicit regarding Oracle's preservation efforts and responses to Plaintiff's discovery requests is shielded from disclosure by the attorney-client privilege and work-product doctrine. The work-product doctrine protects materials that reveal an attorney's strategy and thought processes, *see, e.g., Hickman v. Taylor*, 329 U.S. 495, 511 (1947), including an attorney's opinions related to document preservation and responses to discovery requests. *See, e.g., EEOC v. Boeing Co.*, 2007 U.S. Dist. LEXIS 29107, at *7 (D. Ariz. Apr. 18, 2007) (refusing to compel 30(b)(6) deposition on topic that required "defense counsel's legal theories regarding the manner in which defendant responded to plaintiff's [discovery] requests," due to impingement on attorney-client and work-product privileges); *Ingersoll v. Farmland Foods, Inc.*, 2011 U.S. Dist. LEXIS 31872, at *16-18 (D. Mo. March 28, 2011) (granting protective order shielding defendant from 30(b)(6) deposition on procedures it had taken to search, locate, gather, and produce responsive documents because this information was protected by the attorney-client privilege and work-product doctrine); *In re Bilzerian*, 258 B.R. 846, 849 (Bankr. M.D. Fla. Jan. 29, 2001) (issuing a protective order to preclude 30(b)(6) deposition where deposition would "impinge on the work product . . . [and] allow unwarranted inquiries into the mental impressions" of a party's counsel); *see also Gibson v. Ford Motor Co.*, 510 F. Supp. 2d 1116, 1123-24 (N.D. Ga. 2007) (denying plaintiff's request for the contents of defendant's litigation hold notice because such "instructions are often, if not always, drafted by counsel, [and] involve their work product").

At a minimum, topics nos. 1, 2, 5, 7, and 10 of Plaintiff's 30(b)(6) notice inappropriately seek to solicit information that is privileged and protected by the attorney-client privilege and work-product doctrine. *See Ray Decl.*, Ex 3. Topic no. 1, for example, seeks information related to Oracle's "efforts to . . . identify . . . documents in this litigation." *Id.* (emphasis added). Topic no. 2 asks for "the identity of all past and present [Oracle] employees whose documents [Oracle] identified . . . or considered identifying, collecting, reviewing, or searching." *Id.* (emphasis

added). Topic no. 5 asks about Oracle’s “*efforts and plans* to preserve documents relevant or potentially relevant” including “each step undertaken to preserve such documents.” *Id.* (emphasis added). Topic no. 7 seeks information related to Oracle’s “*ongoing efforts to investigate . . .* documents and things responsive or potentially responsive to Plaintiff’s discovery requests and relevant or potentially relevant to this litigation.” *Id.* (emphasis added). And topic no. 10 seeks “any document reflecting or memorializing any facts called for in” the ten noticed topics, which would include any litigation hold letters. *See id.* (emphasis added). Each of these topics clearly calls for information related to Oracle’s “counsel’s legal theories” and “the manner in which [Oracle intends to] respond[] to plaintiff’s requests,” *Boeing Co.*, 2007 U.S. Dist. LEXIS 29107, at *7, and is protected by the attorney-client privilege and work-product doctrine.

Instead of enduring a day long deposition where Plaintiff seeks to obtain privileged and protected information, Oracle offered to provide Plaintiff, if requested through an appropriate interrogatory, non-privileged information regarding its document retention, preservation, and destruction policies; and when and to whom litigation holds related to this case were issued. *See Ray Decl.* ¶ 4, Ex. 4. But Plaintiff refused this offer, *see id.* ¶ 5, confirming that all Plaintiff seeks is to subject Oracle to a wasteful, expensive, and burdensome deposition.

C. The Discovery Plaintiff Seeks Is Only Appropriate Where There Has Been A Showing Of Discovery Misconduct

Courts generally only compel 30(b)(6) depositions regarding a defendant’s collection, preservation, and production efforts where discovery is well underway and there is evidence of discovery misconduct. *See, e.g., Smithkline Beecham Corp. v. Apotex Corp.*, 2009 U.S. Dist. LEXIS 117314, at *7-9 (E.D. Pa. Dec. 16, 2009) (denying motion to compel 30(b)(6) deposition regarding the existence, location, and preservation of documents where there was no evidence of spoliation); *Orillaneda v. French Culinary Inst.*, 2011 U.S. Dist. LEXIS 105793, at *17 (S.D.N.Y. Sept. 19, 2011) (“the search and maintenance of a party’s information systems may be relevant . . . when the documents already produced permit a reasonable deduction that other documents may exist or did exist and have been destroyed”) (citation and quotations omitted). Absent a showing of misconduct or spoliation, courts have repeatedly found that “discovery

about discovery” is not relevant to a plaintiff’s claims. *See, e.g., Orillaneda*, 2011 U.S. Dist. LEXIS 105793, at *27 (holding that “plaintiff’s requests for discovery of defendant’s search procedures and information systems do not seek relevant information”); *Advante Int’l Corp. v. Intel Learning Tech.*, 2006 U.S. Dist. LEXIS 86334, at *13-14 (N.D. Cal. 2006) (refusing to compel “discovery about discovery” because it is was not “reasonably calculated to lead to the discovery or admissible evidence”). As discovery has just begun and there is no evidence of any discovery misconduct or spoliation, the information Plaintiff seeks through his 30(b)(6) deposition of Oracle is irrelevant and inappropriate, and should be prohibited by the Court.

V. CONCLUSION

For the foregoing reasons, Oracle respectfully requests that the Court grant its motion and issue a protective order precluding Plaintiff from proceeding at this time with its 30(b)(6) deposition of Oracle.

Dated: February 20, 2015

Respectfully submitted,

By /s/ Sarah M. Ray

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